23 22 Infn James Short

DECEMBER 18th, 1770.

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Thos Short

13th Febry 1771
[illegible]

Prefer heir of conquest

INFORMATION

FOR

JAMES SHORT, nephew of the deceased James Short, Optician in London, and heir of conquest to him; and for Dr. Donald Monro, Physician in London; and John Spottiswood, Solicitor at Law there, his guardians;

AGAINST

THOMAS SHORT, Optician in London.

JOhn, Alexander, James, and Thomas Shorts were all brothers-german.

John, the eldest brother, was bred a painter, went abroad, settled at Virginia, and died some years ago, leaving James Short, his eldest son, and several other children.

Alexander, the second brother, was a cabinet-maker in London, and died unmarried, 5th May 1768, without making any will or settlement of his affairs.

James, the third brother, was an optician at London; and, by his distinguished knowledge in his business, he acquired a considerable fortune, and died unmarried in June 1768, about six weeks after the death of Alexander, the second brother.

Thomas, the youngest, and now the only surviving brother of these four, was lately optician at Leith, and now carries on that business at London, in the house of his deceased brother, James.

A Part

Part of the eſtate of James, the third brother, all of which he acquired by his own induſtry, was ſecured by ſundry heritable bonds, granted to him by Hugh Montgomery of Broomlands, upon which he was infeft in the lands and eſtate of Broomlands; and theſe debts, principal and intereſt, do now amount to about 2,200l. ſterling.

James, the third brother, executed a diſpoſition, by which he ſpecially diſponed and conveyed the foreſaid heritable bonds and infeftments upon the eſtate of Broomlands, to and in favours of the foreſaid Alexander Short, his immediate elder brother, and his heirs and aſſignees.

This deed contains the following clauſe: " Reſerving nevertheleſs full power and liberty to me, at any time of my life, and " even in the article of death, to revoke and recal theſe preſents at " my pleaſure, and to uplift, aſſign, gift, or otherwiſe diſpoſe of " the reſpective ſums before mentioned, as I ſhall think proper, " without conſent of the ſaid Alexander Short, or his foreſaids, " ſought or obtained thereto, in the ſame manner as if theſe preſents had not been granted. But, in caſe I do not uplift, or otherwiſe diſpoſe of the ſubjects above diſponed, I hereby declare this " preſent deed to be valid, and to have all the force and effect of a " delivered evident, albeit the ſame be found in my cuſtody, or " in the cuſtody of any other perſon, undelivered at the time of " my deceaſe; with the not-delivery whereof I hereby diſpenſe " for ever."

The eſtate of Broomlands was lately purchaſed, at a judicial ſale, by Mr. Hamilton of Bourtreehill, who has brought a proceſs of multiple-poinding againſt the different heirs of Mr. Short, that he might pay ſafely to the perſon having the beſt right.

This proceſs of multiple-poinding was remitted to the Lord Kennet, who was ordinary in the ranking of Broomland's creditors; and compearance having been made for Thomas Short, the immediate younger brother, who claimed a right to the heritable bonds as heir of line; and for James Short, the eldeſt ſon of the eldeſt brother, who claimed the ſame as heir of conqueſt; the Lord ordinary, upon adviſing a minute of debate, of this date, pronounced the following interlocutor: " Having conſidered what is above ſet " forth, prefers the ſaid James Short, the heir of conqueſt, to the " heritable debts in queſtion."

July 20th, 1770.

And

And to this interlocutor his Lordſhip adhered, upon adviſing a repreſentation and anſwers. Nov. 20th, 1770.

The heir of line preferred a ſecond repreſentation; whereupon the Lord ordinary made aviſandum with the cauſe to your Lordſhips, and appointed both parties to give in informations; and, in obedience thereto, this is humbly offered on behalf of James Short, the heir of conqueſt.

The heir of line did maintain, in the firſt place, that, upon the ſuppoſition that no right whatever was veſted in Alexander Short, in reſpect of his predeceaſing the granter; that, in that caſe, the ſubjects behoved to fall to Thomas Short, as the heir of line of Alexander, but without the neceſſity of being ſo ſerved to him; becauſe heirs of line are the favourites of the law, and are always underſtood to be called, where it does not appear that they are excluded.

But the heir of conqueſt muſt confeſs, that he cannot perceive the force or juſtice of this reaſoning. Heirs of line are no doubt underſtood to be called as heirs to the ſucceſſion of ſuch ſubjects as devolve to heirs of line, where they are not excluded by a particular deſtination; but it is equally clear, that, where ſubjects are conqueſt, a deviſe to heirs does entitle the heir of conqueſt to take, and not the heir of line; ſo that the argument urged for the heir of line does, in a great meaſure, reſolve into a *petitio principii*, viz. whether the ſubject would have been underſtood as conqueſt, or as heritage, in the perſon of Alexander?

If it would have been heritage in the perſon of Alexander, upon the ſuppoſition that Alexander had taken the ſubjects in virtue of the foreſaid diſpoſition, there might have been ſome room for pleading, that the heirs called by that deed were Alexander's heirs of line; but it is, with ſubmiſſion, equally clear, that, if it would have been conſidered as conqueſt in the perſon of Alexander, that, failing of himſelf, his heir of conqueſt would be underſtood to be called to the ſucceſſion by that deed. *Heirs*, when mentioned generally in any deed, muſt always be explained *ſecundum ſubjectam materiam*. In a perſonal bond, by *heirs*, are underſtood the whole neareſt of kin of the creditor. The heir of line, as the general heir, may take what, neither by the deſtination of the proprietor, nor by the operation of the law, belongs to another heir; but they certainly are not entitled to take what, from the nature of the ſubject,

ject, does not belong to the heir of line, but to the heir of conqueſt.

The heir of conqueſt does therefore apprehend, that the ſuppoſal of the right never to have been in Alexander, will, by no means, give the ſucceſſion to the heir of line of Alexander. But, on the other hand, it would naturally ſeem to follow, that if the right, in favours of Alexander, was totally vacated by his predeceaſe, that the ſubjects would belong to James Short, as the heir of conqueſt of James, the granter of the deed, as there is no doubt that the ſubjects were conqueſt in his perſon, and, independent of a ſpecial ſettlement, would have gone to his heir of conqueſt, preferably to his heir of line.

At the ſame time, it occurs to the heir of conqueſt, that the real merits of the preſent queſtion will fall to be reſolved by this other queſtion, viz. whether, if Alexander had taken under his brother's ſettlement, the ſubjects would have fallen to be conſidered as heritage, or as conqueſt, in his perſon.

In a ſettlement of this nature, it makes no difference whether the diſponee predeceaſed or ſurvived the granter, becauſe, although in all ſuch ſettlements, the granter generally reſerves his own liferent, and full powers of altering, ſo that he can vacate the ſettlement any time during his life, yet it falls to be conſidered as a deed, *de præſenti*, by which the fee, though reſolvable, does immediately veſt in the diſponee. If the diſpoſition had been delivered, as it contained both procuratory and precept, the diſponee might have immediately taken infeftment, which infeftment, no doubt, would have been reſolvable, by the granter's afterwards exercing his reſerved powers: but, if no ſuch alteration ſhould be made, the diſpoſition and infeftment would ſubſiſt, as a valid and an effectal ſettlement of the eſtate, and Alexander's heir behoved to make up his titles, by a ſpecial ſervice, as heir to him, and that without diſtinction, whether he ſurvived or predeceaſed James Short, the granter; and although, in reſpect the diſpoſition has continued a perſonal deed, James's heir may make up titles to the ſubjects, as heir in ſpecial to him, yet it would likewiſe be competent to him to take, by a general ſervice to Alexander, under the aforeſaid deed. In ſhort, the heir of conqueſt cannot diſcover how it can, with any reaſon, be maintained, that one heir muſt be underſtood as called under the foreſaid deed, in the event of the diſponee's

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ſurviving the granter, and, under the very ſame words, a different heir muſt be underſtood as called in the event of predeceaſing him; ſo that the queſtion comes preciſely to this, whether the ſubjects in queſtion were heritage or conqueſt, in the perſon of Alexander, taking them under the foreſaid diſpoſition.

And, with all ſubmiſſion, the queſtion ſeems to be attended with no difficulty, as it is clear, that Alexander, taking under the foreſaid diſpoſition, would have taken by a ſingular title. He in no ſenſe can be conſidered as an heir, or univerſal ſucceſſor of the defunct, but merely as a diſponee; and however ſuch a diſpoſition might be reduced, at the inſtance of creditors, as a gratuitous deed to their prejudice, if the diſponer had not left other ſubjects ſufficient for their payment, yet it is a clear caſe, that a brother, taking ſubjects under ſuch diſpoſition, is not underſtood to be liable to his debts, as heir, *præceptione hæreditatis*. This has been found in various inſtances, and, particularly, in three caſes, collected in the dictionary. viz. 22d November 1765, Scott *contra* Boſwell.——17th December 1662, Lady Spencerfield *contra* Laird Kilbrachmont.—And, 22d December 1664, heirs-portioners of Seton *contra* Seton. Vol. II. fol. 35.

The deed falls to be conſidered as a conveyance, *de præſenti*, which is not to be judged of, according to what may accidentally happen to be the caſe, at the time of the granter's death, but according as things ſtood at the date of the deed; and as, at the date of the deed, the diſpoſition was not heir *alioqui ſucceſſurus*, the granter having *hæredes propinquiores in ſpe*, ſo the diſponee could only be conſidered as a ſingular ſucceſſor, taking the eſtate by ſingular titles, and not as univerſal repreſentative of the defunct.

If a man ſhould diſpone his eſtate to a remote relation, having nearer heirs in exiſtence at the time, and that theſe nearer heirs ſhould all fail before the death of the granter, it is plain that ſuch diſponee could be conſidered in no other light than as taking the eſtate by diſpoſition. He could never be conſidered as heir and univerſal ſucceſſor to the defunct. The accident of the nearer heir's dying in the mean time, could never ſurely alter the caſe; and as it makes no difference in a queſtion of this kind, whether the diſponee's proſpect of the ſucceſſion was more near, or remote, it is ſufficient to ſay, that, at the date of the deed, the diſponee was

not *alioqui ſucceſſurus* in the ſubjects, but that the granter had *hæredes propinquiores*, whether in actual exiſtence or only *in ſpe*.

If, therefore, Alexander Short would not have been conſidered, in the eye of law, as taking the ſubjects under the foreſaid deed, *præceptione hæreditatis*, but by diſpoſition; and if it would have had no other legal effect againſt him, than as taking under a ſingular title, it is humbly thought that theſe ſubjects muſt fall to be conſidered in his perſon as conqueſt, and not as heritage; and that, upon his death, without any particular ſettlement, they would, of conſequence, devolve upon his heir of conqueſt, and not upon his heir of line.

Indeed, the opinion of Sir Thomas Craig is in point, for the heir of conqueſt, in the very caſe now in hand: "In hoc conquæſtu notandum eſt, conquæſtum non dici, quod quis ex avo vel patre capit, ſi eo tempore quo capit erat proxime ſucceſſurus; non enim tum dicitur conquæſtus, ſed tanquam præceptio hæreditatis, et qui accipit, pro hærede, ſaltem univerſali ſucceſſore, habebitur; et hoc inter aſcendentes et deſcendentes. Se in collaterali ſucceſſione alia ratio eſt; nam ſi fratri quid dederit, licet is ei immediate ſucceſſurus videatur, tamen non cenſetur præceptio hæreditatis, ſed merus conquæſtus, et quaſi alienatio in extraneum facta, niſi id expreſſe dicatur, alienationem factam in fratrem tanquam ſucceſſurum; nos hæredem apparentem dicimus." Lib. II. dieg. 15. § 17.

Lord Bankton delivers his opinion in the following words: "Conqueſt that falls to the heir of conqueſt is all heritable rights, whereupon infeftment did or might follow, acquired by the deceaſed upon ſingular titles, (*i. e.*) to which he did not ſucceed as heir, *præceptione hæreditatis*, or otherwiſe." Vol. II. fol. 297, § 21.

In like manner, Mr. Erskine; "Thoſe heritable rights, to which the deceaſed did himſelf ſucceed, as heir to his father, or other anceſtor, got ſometimes the name of heritage, in a ſtrict ſenſe, in oppoſition to the *feuda nova*, or feus of conqueſt, which he had acquired by ſingular titles, and which deſcend not to his heir of line, but of conqueſt." Lib. 3d, tit. 8, § 6.

It was ſaid for the heir of line, that if Alexander had ſurvived his brother James, he might have made up titles to the heritable bond by a ſervice as heir of conqueſt; and that, in that caſe, there can be no doubt that the ſubjects would have deſcended to Alexander's

der's heir of line, and that it ought to make no difference that he predeceaſed his brother.

But it is unneceſſary to enter into the queſtion, What would have been the conſequence if Alexander had outlived his brother, and had, in fact, made up titles to the ſubjects in queſtion, as heir of conqueſt? It is ſufficient to obſerve, that having predeceaſed his brother, he never could be heir to him in any thing; and as his brother had *hæredes propinquiores in ſpe*, both at the date of the diſpoſition and at the time of Alexander's death, the diſpoſition, which is the only right he ever had to the ſubjects, cannot be conſidered as a *præceptio hæreditatis*. He could, with no propriety be conſidered as heir to his brother, but entirely as a ſingular ſucceſſor.

It was ſaid for the heir of line, that the diſpoſition in favours of Alexander Short did imply the condition of James, the granter's, dying without heirs of his own body, according to the famous law, *de conditionibus et demonſtrationibus*, and from thence he concluded, that the ſubjects in queſtion behoved to be conſidered as heritage, and not as conqueſt, for that he fell to be conſidered as an heir called to the ſucceſſion, failing the granter's own iſſue.

But, with all ſubmiſſion, it is not eaſy to perceive the force of this argument. For ſuppoſing that James Short had granted the diſpoſition to a remote relation, or to a mere ſtranger, the foreſaid condition would have been implied in that caſe, as much as in this; and yet it is impoſſible to maintain, that the ſubjects would fall to be conſidered as heritage in the perſon of a ſtranger diſponee. The foreſaid conditions being implied in the ſettlement, cannot alter the nature of the right under which Alexander Short did take, or render him an heir in place of a ſingular ſucceſſor.

Let it be ſuppoſed that the condition, in place of being implied, had been expreſſed, yet ſtill Alexander would not have taken the eſtate as heir, but by a ſingular title, as diſponee. The rule of law is, that *poſitus in conditione non cenſetur poſitus in inſtitutione*, ſuppoſing that an heir had exiſted of James Short's body, he could not have taken up the eſtate upon that diſpoſition, but he behoved to ſerve heir at law under the former ſettlements, and, conſequently, Alexander Short, notwithſtanding ſuch condition had been expreſſed in the deed, could only be conſidered as a conditional diſponee, taking the eſtate upon a ſingular title, and not *præceptione hæreditatis*.

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The heir of conqueſt ſhall not trouble your Lordſhips with more words. He humbly apprehends, that in whatever light this matter ſhall be viewed, it is clearly in his favour. If the diſpoſition ſhall be underſtood to have been vacated by the predeceaſe of Alexander the diſponee, in that caſe it is plain that James Short, as heir of conqueſt to his uncle James, would be intitled to the heritable bond in queſtion; and it is, with ſubmiſſion, equally plain, that as, by the foreſaid diſpoſition, the ſubjects would fall to be conſidered as conqueſt in the perſon of Alexander, that James muſt, in the other view, be intitled to take them under the character of heir of conqueſt to Alexander; and therefore, upon the whole, it is humbly hoped that your Lordſhips will have no difficulty to prefer the heir of conqueſt.

In reſpect whereof, &c.

RO. MACQUEEN.